UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA **v.** **ROMONE L. GABRIEL,** **Defendant.**	**Criminal Action No. 02-216 (JDB)**

MEMORANDUM OPINION

This case is before this Court on remand for resentencing. In a March 2, 2005, order, the D.C. Circuit instructed this Court to resentence defendant in accordance with its April 16, 2004 opinion in this case (agreeing with the parties that certain issues require resentencing, and rejecting other arguments raised by defendant for the first time on appeal), see United States v. Gabriel, 365 F.3d 29 (D.C. Cir. 2004), and with the decision of the Supreme Court in United States v. Booker, 125 S. Ct. 738 (2005). Defendant now contends that this Court should also address on remand a sentencing argument that the D.C. Circuit already considered and rejected on appeal under a plain error standard -- that the government had failed to prove that the defendant's prior convictions for burglary in 1986 were a "crime of violence" within the meaning of the relevant section of the Sentencing Guidelines.

Following full briefing and argument of the parties, this Court explained its view at the April 14, 2005, resentencing of defendant that it could not reconsider the question of whether the 1986 burglary convictions were a "crime of violence." The Court proceeded to calculate an (advisory) Guidelines range of 51 to 63 months, and sentenced defendant at the bottom of that range. The Court explained at the hearing that it would issue a decision describing in greater

detail the reasoning behind its conclusion that it lacked the authority to address the issue anew. The Court sets out its reasoning herein.

BACKGROUND

Defendant was arrested on April 18, 2002, when officers found at his residence (among other things) a sawed-off shotgun, a handgun, ammunition, and heroin.[1] On October 9, 2002, following a jury trial, he was convicted of two counts of unlawful possession of a firearm or ammunition by a convicted felon under 18 U.S.C. § 922(g), one count of possession of heroin under 21 U.S.C. § 844(a), and one count of possession of an unregistered firearm under 26 U.S.C. § 5861(d). On March 12, 2003, this Court sentenced defendant to 83 months imprisonment, three years supervised release, a total assessment of $325, and a fine of $2,000. The sentence was based on a United States Sentencing Guidelines offense level calculation of 26 under U.S.S.G. § 2K2.1 and a criminal history category of III, resulting in a sentencing range of 78 to 97 months.

Defendant took an appeal from the conviction and the sentence. On appeal, the government conceded that the case should be remanded for resentencing for two reasons. First, the government agreed that the two convictions for the section 922(g) counts should have merged such that the defendant should have been sentenced only on one of the counts. Second, the government admitted that a 1981 burglary conviction was too old to qualify as a "crime of violence" for purposes of calculating defendant's offense level under U.S.S.G. § 2K2.1 in light of the commentary to that section.[2] In an opinion dated April 16, 2004, the Court of Appeals agreed that resentencing would be necessary on these issues. See Gabriel, 365 F.3d at 30. The court then turned to two other issues on which the parties differed.

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[1] Defendant was held in custody on a surety bond.

[2] The 1981 conviction was not included in the criminal history calculation.

The first issue involved the empaneling of a juror who lived near the defendant's home. The court rejected defendant's contention that the failure to strike the juror was error; this holding is not germane to the present dispute. See id. at 30-31. The second issue concerned whether the Court was correct to treat defendant's two 1986 convictions for burglary as a "crime of violence" for purposes of calculating his offense level under section 2K2.1.[3] See id. at 31-33. The Guidelines define a "crime of violence" as an offense punishable by more than a year in prison that "has as an element the use . . . of physical force against another," or is a "burglary of a dwelling" or one of several other listed offenses not relevant here. U.S.S.G. § 4B1.2(a). Defendant's 1986 convictions were for second degree burglary under the D.C. Code, an offense that does not require the use of force against another, and is not confined to burglary of a dwelling. See Gabriel, 365 F.3d at 32.

Drawing on relevant precedent, the court explained that the conviction could still meet the Guidelines definition of a "crime of violence" if "the jury had been required to find, or if documents in connection with a plea showed, that the burglaries (or one of them) were of a 'dwelling.'" Id. at 32. The court noted that the government had failed to submit any documents that could be used to show that it was a dwelling that was burglarized (such as "a judgment of conviction, a plea agreement or other statement by the defendant on the record, presentencing report adopted by the court, and the findings of the sentencing judge"). Id. "As the burden is on the government to produce these documents," the court concluded, "use of the convictions to establish the 'base offense level' was error." Id. at 33.

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[3] The court explained that: "Although Gabriel had *two* 1986 convictions for second degree burglary, they resulted from a single proceeding. Thus, under § 4A1.2(a)(2) '[p]rior sentences imposed in related cases are to be treated as one sentence for purposes of § 4A1.1(a), (b), and (c),' and the two burglaries (assuming they count as "crimes of violence") count as only one such crime." Id. at 31-32 (emphasis in original).

But defendant had "raised no objection" at sentencing to the inclusion of the 1986 burglary convictions as a "crime of violence," and the court explained that it was therefore required to assess the issue "under the standard of plain error." Id. Applying this standard, the court held that defendant could not demonstrate a "reasonable likelihood" that the error had affected his sentence.[4] The court concluded its opinion as follows: "Accordingly, we remand for resentencing because of the errors that the parties agree require a remand; in all other respects the decision of the district court is affirmed." Id.

The D.C. Circuit issued its mandate to this Court on June 16, 2004. A month later, defendant filed a petition for a writ of certiorari to the Supreme Court. Shortly thereafter, this Court held a hearing at which it continued the resentencing of defendant and asked the parties to brief their views on the implications of the Supreme Court's then recently issued decision in Blakely v. Washington, 124 S. Ct. 2531 (2004). This Court also noted that the second § 922(g) count would be vacated for resentencing and that the parties' agreement that the 1981 conviction should no longer count as a "crime of violence" would result in a reduction of defendant's offense level to a 22.

The parties filed briefs on the Blakely issues in the case. Defendant argued that his initial sentence ran afoul of Blakely because it was based on several findings that were not made by the jury beyond a reasonable doubt, including the finding that the 1986 burglary convictions constituted a "crime of violence." Def. Mem. in Aid of Resent. at 3-4. In a footnote, defendant observed that "this Court at sentencing did not have an indictment or jury instructions from Mr. Gabriel's prior offense and the presentence report did not clarify whether the offenses of

[4] It is not entirely clear whether the court meant that defendant had not shown that the government would have been unable to prove that the burglaries were of a dwelling had the issue been addressed at the initial sentencing, or that a different sentence would have been calculated had the burglary convictions not counted as a "crime of violence."

conviction involved burglary or a dwelling." Id. at 5 n.2. The government responded by arguing that Blakely was inapplicable to this case. In light of the Supreme Court's pending consideration of the application of Blakely to the Sentencing Guidelines, resentencing in the case continued to be postponed.

On January 12, 2005, the Supreme Court issued its decision in United States v. Booker, holding that the mandatory application of the Sentencing Guidelines is unconstitutional, and that a court must "consider Guidelines ranges" applicable to the defendant, but is permitted "to tailor the sentence in light of other statutory concerns as well." 125 S. Ct. at 756-57. Two weeks later, the Supreme Court issued the following order in this case: "Motion to proceed in forma pauperis and petition for a writ of certiorari granted. Judgment vacated and case remanded for further consideration in light of United States v. Booker, 543 U.S. ___ (2005)." On February 8, 2005, the D.C. Circuit issued its own order recalling its mandate from this Court: "It is ordered, on the court's own motion, that the court's mandate issued on June 16, 2004, be recalled. The Clerk of the United States District Court for the District of Columbia is requested to return the mandate forthwith." Order of Feb. 8, 2005.

On March 2, 2005, the Clerk of this Court returned its mandate to the D.C. Circuit. Later that day, the D.C. Circuit issued an order stating, in its entirety:

> Upon consideration of the joint motion for remand and to expedite return of the mandate, it is ordered that the motion be granted. It is further ordered, on the court's own motion, that the court's judgment filed April 16, 2004, be vacated. It is further ordered and adjudged that the judgment of the district court appealed from in this cause be affirmed in part and the case remanded for further proceedings in accordance with this court's opinion issued April 16, 2004, and the Supreme Court's opinion in United States v. Booker, 125 S. Ct. 738 (2005).

Order of Mar. 2, 2005. The D.C. Circuit reissued its mandate to this Court that same day.

This Court scheduled a sentencing hearing for March 24, 2005. A new presentence report

was prepared suggesting a Sentencing Guideline calculation (now advisory under Booker) that again treats the 1986 burglary convictions as a "crime of violence" for purposes of calculating defendant's base offense level. Prior to the hearing, defendant submitted a six-page memorandum of law that discussed defendant's background and argued for a lenient sentence under Booker, but did not address the "crime of violence" issue. At the hearing, however, defendant argued that there was insufficient evidence for the Court to find that the 1986 burglary convictions involved burglary of a dwelling and therefore could not count as a "crime of violence." This Court noted its concern that it lacked the authority to revisit the issue of the 1986 convictions after the D.C. Circuit had already considered precisely that same question in its April 16, 2004, decision and held that the treatment of the convictions as a "crime of violence" did not amount to plain error. This Court continued the sentencing one final time, and asked the parties to file supplemental papers on this issue.

This Court resentenced defendant on April 14, 2005. After hearing argument from both parties, the Court explained its view that it could not reopen the question of the 1986 burglary convictions given the D.C. Circuit's orders in this case. Counting those convictions as a "crime of violence" under section 2K2.1, the Court calculated an offense level of 22 and therefore an advisory Guidelines range under Booker of 51 to 63 months. Had the Court not counted the 1986 burglary convictions as a "crime of violence," the offense level would have been 18, resulting in an advisory Guidelines range of 33 to 41 months. The Court then imposed a sentence of 51 months, with credit for time served.[5] The Court explained to the parties that a written opinion on

[5] Specifically, the Court imposed a sentence of 51 months on count one (possession of a firearm and ammunition by a felon), 12 months on count three (possession of heroin), and 51 months on count four (possession of an unregistered firearm), with counts three and four to be served concurrently with one another, and concurrently with count one. The Court also sentenced the defendant to three years of supervised release, special assessments totaling $225, and a fine of $2,000.

the issue of the Court's ability to consider the 1986 burglary convictions would be forthcoming shortly. Judgment was entered on April 15, 2005.

ANALYSIS

The standard that a district court should follow in assessing the proper scope of resentencing on remand from a D.C. Circuit opinion was set out in United States v. Whren, 111 F.3d 956 (D.C. Cir. 1997). In that decision, the court explained that "upon a resentencing occasioned by a remand, unless the court of appeals expressly directs otherwise, the district court may consider only such new arguments or new facts as are made newly relevant by the court of appeals' decision -- whether by the reasoning or by the result." Id. at 960. Whren added that even sentencing issues that are not made newly relevant by the court of appeals decision might still be considered if "it is both obvious and prejudicial and therefore arguably rises to the level of 'plain error'" under Federal Rule of Criminal Procedure 52(b). Id. at 960-61.

A few years after deciding Whren, the D.C. Circuit sitting en banc was faced with a variant of the same issue in United States v. McCoy, 313 F.3d 561 (D.C. Cir. 2002) (en banc). As the majority opinion in McCoy described the question in that case:

> We here address the scope of resentencing after a remand from the court of appeals under the following conditions: (1) the defendant seeks to raise a contention that was *contingently* relevant in the initial sentencing (but the contingency did not then materialize); (2) defendant did not raise the contention in that sentencing; and (3) the district court's action on remand renders the contention determinative (if it is allowable and correct).

Id. at 561-62 (emphasis in original).[6] The court concluded that "the defendant's ability to raise her

[6] The sentencing issue in McCoy was contingent in the following sense. The government in McCoy had requested an offense level enhancement for obstruction of justice, to be applied to both of the crime "groups" in the case (false statements and perjury). Id. at 561-62. The defendant challenged the enhancement based on an argument that, through the operation of an "arcane formula" in one of the relevant guidelines, "would have been useful if but only if other sentencing adjustments had occurred yielding a particular alignment of the two groups (as a practical matter, a gap of three or four [offense] levels, as opposed to the initial gap of six [offense

contingent issue here depends upon whether she could establish 'good cause,' within the meaning of Rule 32(b)(6)(D) [(now Rule 32(i)(1)(D))] of the Federal Rules of Criminal Procedure, for not having raised it sooner." Id. at 562.

Seizing on language in McCoy that "the Whren test must be understood in light of" the "good cause" standard of Rule 32, defendant contends that McCoy creates a "good cause" standard for all cases on remand, not only those involving "contingent" arguments. This is an incorrect reading of McCoy. The portions of the opinion quoted above leave no doubt that the court in McCoy believed itself to be addressing only the unique situation of a "contingent" argument. In fact, later in the opinion, the court explains its view that its treatment of a case involving a contingent argument is merely an application of the Whren inquiry into whether the defendant has reason to raise a new argument on remand because it was made newly relevant by the appellate decision:

> A requirement that the district court consider such factors as these in applying Rule 32(b)(6)(D) does nothing to disturb Whren's principle that parties should raise at sentencing the objections that they have "reason" to raise. But incentives to raise an issue have different strengths, and nothing in Whren suggests that parties must be considered to have "reason" to raise a doubly contingent objection for which the likelihood of any significance is remote.

Id. at 566 (citation omitted).

The court in McCoy did not state that it was overturning the broad "plain error" rule of Whren. Finally, and most importantly, a subsequent panel of the D.C. Circuit itself read McCoy to apply only to contingent arguments:

> In McCoy, we held that, when a defendant seeks to raise for the first time on remand an argument that was only "*contingently* relevant in the initial sentencing

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levels])." Id. at 562. On appeal, the defendant persuaded the Court of Appeals to change "the constellation of groups" such that "the gap between the more serious and the less serious groups was four [levels] instead of six," and in this fashion, the objection to the obstruction enhancement became relevant for the first time in the case on remand for resentencing. Id. at 563.

> (but the contingency did not then materialize)," and when "the district court's action on remand renders the contention determinative," a defendant may raise the previously contingent issue if "she [can] establish 'good cause' . . . for not having raised it sooner."

United States v. Johnson, 331 F.3d 962, 964 (D.C. Cir. 2003) (quoting McCoy, 313 F.3d at 561-62). This Court has no authority to read McCoy any differently. Because there is no claim that the question whether the 1986 burglary convictions were a "crime of violence" was only "contingently" relevant during the initial sentencing of defendant, it is the rule of Whren rather than the rule of McCoy that applies in this case.[7]

Whren provides that a district court may consider a sentencing issue on remand that was not raised during the initial sentencing only when one of the following three situations is present: (i) the issue was "made newly relevant by the court of appeals' decision", (ii) any legal error rises to the level of "plain error," or (iii) the court of appeals "expressly direct[ed]" the district court to consider the new issue. Whren, 111 F.3d at 960-61. None of those circumstances are present here. The "crime of violence" issue was not made newly relevant by the April 16, 2004 decision of the D.C. Circuit or any of the other orders in this case. The April 16, 2004 D.C. Circuit decision also expressly held that treating the 1986 burglary convictions as a "crime of violence" did not constitute plain error. See Gabriel, 365 F.3d at 33.

Finally, the D.C. Circuit did not direct this Court to consider the issue of the 1986 burglary convictions. In fact, just the opposite is true: in its April 16, 2004 opinion, the D.C. Circuit explicitly limited its remand only "for resentencing because of the errors that the parties agree require a remand; in all other respects the decision of the district court is affirmed." Id. at 33.

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[7] This Court therefore respectfully parts ways with Judge Friedman, who held more broadly in United States v. Coates, 295 F. Supp. 2d 11 (D.D.C. 2003), that McCoy "recast the Whren standard to allow a defendant to raise a new departure argument if the defendant can demonstrate 'good cause' why the issue was not presented to the Court at the original sentencing." Id. at 13.

Although the Supreme Court (and then the D.C. Circuit) later vacated the April 16, 2004, decision, the D.C. Circuit in its March 2, 2005 order adopted the scope of the initial remand in sending the case to this Court once again for resentencing in light of Booker: "the case [is] remanded for further proceedings in accordance with this court's opinion issued April 16, 2004, and the Supreme Court's opinion in United States v. Booker, 125 S. Ct. 738 (2005)." Order of Mar. 2, 2005. Thus, there is not only a lack of an explicit appellate instruction to consider the issue of the 1986 burglary convictions on remand, but there is an explicit instruction to consider only errors on which the parties agreed (the merging of the counts and the 1981 conviction) and issues relating to Booker. To consider the question of the 1986 burglary convictions in this situation, then, would not only violate the rule of Whren but raise serious concerns under the "mandate rule" as well. See Indep. Petroleum Ass'n of Am. v. Babbitt, 235 F.3d 588, 596 (D.C. Cir. 2001) (quotation omitted) (mandate rule provides that "an inferior court has no power or authority to deviate from the mandate issued by an appellate court.") (quotation omitted).[8]

[8] Moreover, the law of the case doctrine, which "posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case," counsels this Court not to revisit the 1986 burglary convictions issue. Arizona v. California, 460 U.S. 605 (1983). This is true even though the Supreme Court vacated the D.C. Circuit decision that addressed the issue (and would be true even if the D.C. Circuit had not incorporated that decision in its later remand order). As one district court explained in applying law of a case to a D.C. Circuit opinion where (not unlike here) the Supreme Court reversed the opinion on other grounds, and the D.C. Circuit then vacated its own earlier mandate and the existing District Court judgment:

> The Court is not convinced that, in vacating its earlier "mandate," which directed this Court to proceed in accordance with the Court of Appeals' prior mandate, the Court of Appeals intended to vacate its judgment on issues that the Supreme Court did not address. . . . Here, where there are no new facts or intervening authority that would provide a basis for questioning crucial unappealed holdings by the Court of Appeals on the same factual record, the Court sees no logical basis for upsetting them.

Hopkins v. Price Waterhouse, 737 F. Supp. 1202, 1208 (D.D.C. 1990).

Defendant nevertheless argues that sentencing under Booker itself requires de novo resentencing, in the sense that a district court can consider any issues, evidence, and facts not raised before. Def. Rep. at 2. There is at least some reason to doubt that this is the case. The D.C. Circuit seems to have adopted a more cautious approach to the scope of remand for resentencing under Booker, instructing that remand to the district court should be "for the limited purpose of allowing it to determine whether it would have imposed a different sentence, materially more favorable to the defendant, had it been fully aware of the post-Booker sentencing regime." United States v. Coles, No. 03-3113, 2005 WL 783069, at *7 (D.C. Cir. Apr. 8, 2005) (emphasis added). There is no reason to believe that the court intended a broader remand in this case, or that the court has retreated from the position articulated prior to Booker, where it explained that de novo sentencing

> is in essence a license for the parties to introduce issues, arguments, and evidence that they should have introduced at the original sentencing hearing. The alternative of requiring the parties to raise all relevant issues at the original sentencing hearing serves both equity and efficiency: Each party gets early notice of the other's position, and the district court can resolve all material issues early on -- when the record is fresh in mind and in a single proceeding, thereby minimizing the scope of any second proceeding, i.e., should the first result in a remand.

Whren, 111 F.3d at 960.

But this Court need not resolve the question of whether Booker contemplates de novo resentencing, for whatever else is true of the opinion, it does not contemplate that a court should address sentencing arguments on remand that the defendant not only failed to raise before the initial sentencing court, but that the court of appeals did consider on appeal and rejected as not plain error. Any other conclusion would read Booker to discard not only the mandatory application of the Guidelines, but most of "plain error" law along with it -- in particular, it would render the plain error rule meaningless in any case where the defendant is fortunate enough to

have raised a waived issue on appeal alongside other errors that warrant remand, allowing the defendant to argue the waived issue again on resentencing in a Booker regime. Courts have not given any indication that they expected waiver law to be washed away in this manner; in fact, the Supreme Court itself indicated in Booker that it expected normal principles of plain error law to apply to the question of the application of Booker itself. See Booker, 125 S. Ct. at 769 ("[W]e expect reviewing courts to apply ordinary prudential doctrines, determining, for example, whether the issue was raised below and whether it fails the 'plain-error' test."); Coles, 2005 WL 783069, at *3 ("[W]e review Coles' Booker claim only for plain error.").

Defendant complains that this result allows the Court in this case to sentence the defendant on the basis of facts that even the D.C. Circuit held were not proven by the government and were incorporated into the initial sentence in error, just not in plain error. But that is true of *any* case where an appellate court finds plain error as to one issue and remands the case as to another. Indeed, it would have been true in this case even in the absence of Booker -- the D.C. Circuit had remanded the case to consider the errors on which the parties agreed but not the issue of the 1986 convictions. It is the very nature of plain error law that a sentence will occasionally rest on arguments that are erroneous, but do not rise to the level of plain error. Although this result can be harsh, the plain error rule was erected to serve interests of judicial efficiency as well as fairness and reflects a "careful balancing of our need to encourage all trial participants to seek a fair and accurate trial the first time around against our insistence that obvious injustice be promptly redressed." United States v. Young, 470 U.S. 1, 15 (1985) (quotation omitted). There is no warrant in Booker for upsetting these settled principles.[9]

[9] Defendant's contention that the government itself "waived" this waiver argument by failing to address it upon resentencing until the Court raised it sua sponte is a red herring. The "waiver of waiver" cases cited by defendant arise in instances where the government has failed to raise a waiver argument of some sort in district court and then attempts to raise the argument on

CONCLUSION

For the reasons stated above, this Court will not revisit the question of the 1986 burglary convictions, which was decided against defendant on appeal by the D.C. Circuit under the "plain error" rule. Sentence was imposed and judgment entered consistent with this opinion on April 15, 2005.

/s/ John D. Bates
JOHN D. BATES
United States District Judge

Dated: May 4, 2005

appeal. See Hernandez v. Cowan, 200 F.3d 995, 997 (7th Cir. 2000). Here, the government did not have a chance to waive the argument at all, since it has not yet been appealed. Indeed, the question in this case is whether this Court has any authority under Whren and the mandate rule to consider the issue of the 1986 convictions at all. It would expand the waiver of waiver rule beyond all recognition to conclude that a district court lacks the authority to consider its own authority to hear cases on remand.

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